These are the tentative rulings for civil law and motion matters set for Thursday, November 20, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, November 19, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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1. **M-CV-0057952 Union Bank N.A. vs. Alizadeh, Mike**

   Defendant's Motion to Amend Answer is denied as the request does not sufficiently establish the basis for the amendment, the delay in bringing the request, or whether the amendment will unduly prejudice the opposing party.

2. **M-CV-0057954 Union Bank, N.A. vs. Alizadeh, Parvaneh**

   Defendant's Motion to Amend Answer is denied as the request does not sufficiently establish the basis for the amendment, the delay in bringing the request, or whether the amendment will unduly prejudice the opposing party.

3. **M-CV-0058070 Mueller, David vs. Gulden, Annie, et al.**

   The motion to reduce judgment is continued to December 18, 2014 at 8:30 a.m. in Department 4 to be heard by the Honorable Colleen M. Nichols.

4. **M-CV-0060928 Portfolio Recovery Associates, LLC vs. Ebert, Mary**

   Plaintiff's unopposed Motion to Deem Admissions is granted. The matters encompassed in plaintiff's requests for admissions, set one are deemed admitted. Sanctions in the amount of $332.50 are imposed on Mary Ebert pursuant to CCP§2033.280(c).

5. M-CV-0062020 Bank of New York Mellon vs. Dubreville, Marcie O.

The motion for summary judgment is dropped from the calendar as no moving papers were filed with the court.

6. M-CV-0062206 Haney, Adam L. vs. Williams, Charles, et al

Plaintiff's Motion for Summary Judgment, or in the Alternative, Summary Adjudication is denied. A motion for summary judgment in an unlawful detainer action may be brought at any time after the answer is filed upon five days notice. (CCP§1170.7.) A party is entitled to bring a motion for summary judgment where there are no triable issues of fact. (CCP§437c.) While the notice requirements and requirements for a separate statement may differ in the context of a summary judgment motion brought in an unlawful detainer action, the legal burden remains the same. The party seeking summary judgment or summary adjudication bears the burden of showing there is no triable issue of material fact and that the party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party has the burden of showing, by affidavit, facts establishing every element necessary to sustain a judgment in favor of the party. (*Consumer Cause, Inc. v. Smilecare* (2001) 91 Cal.App.4th 454, 468.) Once a plaintiff proves its prima facie case, the burden of proof shifts to the defendant to prove material facts. (CCP§437c(p)(1).)

In this instance, plaintiff has failed to meet its initial burden. Plaintiff provides the court with a great deal of argument to support its request. What plaintiff lacks in its motion, however, is any independent discussion or analysis of how the plethora of law cited in the numerous unnumbered pages of its memorandum apply to the current case. The recitation of boilerplate legal contentions on the authority to bring a summary judgment motion provides the court with no facts to support its request. It is the facts that support the request and establish plaintiff's burden; not the blind recitation of legal citations. The supporting papers are devoid of any introduction or factual recitation pertinent to the case. One would be hard pressed to even identify the parties in the action if it were not for the case caption on the pleadings. And while plaintiff is absolutely correct that a separate statement is not required, it is a useful tool and would have assisted the court in this instance. Instead, the court is left to discern from three declarations, without analysis or discussion on the part of plaintiff, whether plaintiff has met its burden. It is not up to the court to establish the absence of an element of a cause of action; that is the burden of plaintiff. Since plaintiff has failed to sufficiently do so, the motion is denied.

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7. S-CV-0029734 Hilburn, David, et al vs. Lund, John, et al

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, such argument shall be heard in Department 42:

Plaintiffs' Motion to Reopen Case and Motion for Prejudgment

Plaintiffs request two forms of relief in their motion. The first seeks to vacate the judgment entered on October 1, 2014 and reopen the case to determine the issue of prejudgment interest pursuant to Code of Civil Procedure section 662. The section states in pertinent part: "[I]n lieu of granting a new trial, [the trial court] may vacate and set aside the statement of decision and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before a decision had been file or judgment rendered." (*Code of Civil Procedure section 662.*) This affords the trial court discretion to grant alternative relief rather than a motion for new trial. (*Concerned Citizens Coalition of Stockton v. City of Stockton (2005) 128 Cal.App.4th 70, 77-78.*) This alternative relief includes *vacating the statement of decision and judgment* in order to reopen the case for further proceedings, which may include the submission of additional evidence. (*Code of Civil Procedure section 662*.) Plaintiffs have not established a sufficient basis to vacate both the statement of decision and judgment. The issue of prejudgment interest does not require that the case be reopened. For these reasons, plaintiffs request for relief under Code of Civil Procedure section 662 is denied.

This, however, does not end the inquiry. Upon review, the court determines the existence of a clerical error that warrants vacating the judgment. The court, on its own motion, may correct clerical mistakes in a judgment so that it conforms to the orders directed by the court. (*Code of Civil Procedure section 473(d).*) The court also has the authority, independent of statute, to correct mistakes in its proceedings and annul within reasonable time a judgment prematurely, inadvertently, or improvidently made. (*In re Doane's Estate (1964) 62 Cal.2d 68, 71; Bastajian v. Brown (1942) 19 Cal.2d 209.*) Plaintiffs did not bring a motion for prejudgment interest prior to the entry of judgment. In fact, the issue of prejudgment interest was not raised by plaintiffs until after the court attempted to resolve disputes between the parties over the form of judgment and without defendants being afforded an opportunity to respond to the issue. The reservation of prejudgment interest to be heard by noticed motion was included to provide the parties with adequate notice and opportunity to be heard. Despite the language in the judgment attempting to reserve the issue pending a noticed motion, the unintended effect of entry of the judgment was to forestall either party from addressing prejudgment interest. This mechanical error in the judgment contradicts the specific intent of the court to hear argument from both parties on the issue of prejudgment interest to ultimately be included in the final judgment. The court, on its own motion, vacates the final judgment entered on October 1, 2014.

The remaining request is plaintiff's motion for a prejudgment interest award under either Civil Code section 3287 or 3288. A request for prejudgment interest based

upon liquidated damages is governed by Civil Code section 3287(a), which states in pertinent part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, …". "The statute does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, 'depends upon a judicial determination based upon conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his debtor.' [Citations omitted.]" (*Fireman's Fund Ins. Co. v. Allstate Ins. Co. (1991) 234 Cal.App.3d 1154, 1173.*) The certainty requirement for Civil Code section 3287(a) generally falls under one of two tests: (1) whether the debtor knows the amount owed or (2) whether the debtor would be able to compute the damages. (*Ibid.*) "[T]he court has no discretion, but must award prejudgment interest upon request, from the *first day there exists both a breach and a liquidated claim*." [Emphasis added.] (*North Oakland Medical Center v. Rogers (1998) 65 Cal.App.4th 824, 828.*) Plaintiffs, however, have not sufficiently established the certainty of the damages vested upon a particular day in order to accurately determine an award for prejudgment interest. First, plaintiffs' motion does not submit declarations to support the ascertainability of the damages. Second, plaintiffs do not provide the actual vesting date for their right to recover damages. Plaintiffs, instead, refer to the filing date of the original complaint "[t]o make things simple". (Plaintiffs' memorandum p. 6:14.) Such an approach is improper in light of the language of Section 3287.

The court also has discretion to award prejudgment interest on unliquidated damages pursuant to Civil Code section 3288 when acting as the trier of fact. (*Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal.3d 801.*) This type of prejudgment interest is awardable for the loss of use of funds as an accretion of wealth that could have been produced during the period it was lost. (*Greater Western Homeowners Ass'n. v. City of Los Angeles (1979) 26 Cal.3d 86, 102-103.*) Plaintiffs, however, have not sufficiently established a basis for such a discretionary award. To reiterate, plaintiffs do not submit declarations in support of their request. Upon review of plaintiffs' moving papers, they have not sufficiently established a basis to award prejudgment interest under Section 3288. For all of these reasons, plaintiffs' motion is denied.

Plaintiffs shall prepare and submit for signature a final judgment that incorporates the court's ruling on prejudgment interest.

<u>Defendant John Lund's (Lund's) Motion to Reopen Case</u>

The motion is denied. Code of Civil Procedure section 662 provides the moving party with an alternative to seeking a new trial. (*Concerned Citizens Coalition of Stockton v. City of Stockton (2005) 128 Cal.App.4th 70, 77-78.*) The section allows the party to request the court to vacate the statement of decision and judgment in order to reopen the case for further proceedings, which may include the submission of additional evidence. (*Code of Civil Procedure section 662.*) The effect of reopening the case in lieu of a new trial is to vacate the statement of decision and the judgment to return the case to

its posture before the filing of the statement of decision and the entry of judgment. (*Uzyel v. Kadisha (2010) 188 Cal.App.4th 866, 899-900.*)

Defendant seeks to reopen the case based upon excessive damages under Code of Civil Procedure section 657(5). This requires a showing, after weighing the evidence, that "the court is convinced from the entire record, including reasonable inferences therefrom, that the court … clearly should have reached a different verdict or decision." (*Code of Civil Procedure section 657.*) The court has carefully reviewed and considered the arguments and evidence submitted by defendant. There is still, however, insufficient evidence to clearly determine a different decision should have been reached. Defendant predominantly raises arguments previously asserted during the trial on issues where the court determined credibility and weight of evidence supported the damage award. Since defendant provides an insufficient showing to warrant reopening the case based upon excessive damages, the motion is denied.

8. S-CV-0030314 Belisle, David, et al vs. Centex Homes, et al

Cross-Complainant Centex Home's (Centex's) Motion for Leave to File First Amended Cross-Complaint

The court may permit a party to amend its operative pleading in the furtherance of justice and on such terms as may be just. (*Code of Civil Procedure section 473(a)(1); Code of Civil Procedure section 576.*) Courts have broad discretion in granting leave to amend and such discretion is usually exercised liberally to permit amendment to the pleading. (*Nestle v. Santa Monica (1972) 6 Cal.3d 920, 939; Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.) This liberality allows for an amendment "at any stage of the proceedings, up to and including trial" so long as there is no showing of prejudice to the opposing party. (*Atkinson v. Elk Corp. (2003) 109 Cal.App.4th 739, 761.*) Initially, it is recognized that Centex has significantly delayed in bringing its motion. The new information, which is the basis for Centex's amendments, was apparently obtained in September 26, 2013. (Podesta declaration ¶7.) This was nearly a year before it filed the current motion. The court also notes that while Centex has made a showing to support its request, the showing is marginal. However, there has been no showing of prejudice to St. Paul if leave to amend is afforded to Centex. In light of the liberal policy favoring amendments and the lack of a showing of prejudice to the opposing party, Centex's motion is granted.

Centex's first amended cross-complaint shall be filed and served on or before November 24, 2014.

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Cross-Defendants St. Paul Fire and Marine Insurance Company and Travelers Property Casualty Company of America (St. Paul's) Motion for Summary Judgment or, in the alternative, Summary Adjudication as to Centex's Cross-Complaint

In light of the court's ruling on Centex's motion for leave to file a first amended cross-complaint, St. Paul's motion is dropped as moot. (*State Compensation Insurance Fund v. Superior Court (2010) 184 Cal.App.4th 1124, 1131; Perry v. Atkinson (1987) 195 Cal.App.3d 14, 17-18;* see also *JKC3H8 v. Colton (2013) 221 Cal.App.4th 468, 477.*)

Cross-Defendant Ironshore Specialty Insurance Company's (Ironshore's) Motion for Judgment on the Pleadings

Ruling on Request for Judicial Notice

Ironshore's request for judicial notice is granted pursuant to Evidence Code section 452.

Ruling on Motion

The motion is denied. A motion for judgment on the pleadings is akin to a demurrer but brought after the time for filing a demurrer has expired. (*Code of Civil Procedure section 438(f)(2); Ludgate Insurance Co. v. Lockheed Martin Corp. (2000) 82 Cal.App.4th 592, 602.*) The motion may be granted where a cross-complaint does not state sufficient facts to constitute a cause of action. (*Code of Civil Procedure section 438(c)(1)(B)(ii).*) In making this determination, the court deems all alleged facts to be true and the pleading is given a reasonable interpretation by reading it as a whole so that the pleading is liberally construed with a view toward attaining substantial justice. (*Ludgate Insurance Co. v. Lockheed Martin Corp. (2000) 82 Cal.App.4th 592, 602.*) In this case, Ironshore challenges the sufficiency of St. Paul Fire and Marine Insurance Company and Travelers Property Casualty Company of America's (collectively "St. Paul") first amended cross-complaint. It contends the declaratory relief, equitable indemnity, and equitable contribution causes of action are insufficiently pled pursuant to Code of Civil Procedure sections 426.10 and 428.10(b). Specifically, Ironshore asserts that all three causes of action are improper since they are unrelated to the underlying construction defect action. This, however, too narrowly interprets St. Paul's ability to file a cross-complaint.

There are two types of cross-complaints that may be filed: (1) a compulsory cross-complaints or (2) a permissive cross-complaint. Compulsory cross-complaints must be brought to raise causes of action related to the subject matter of the plaintiff's complaint otherwise the defendant may be barred from asserting the claim in a later action. (*Code of Civil Procedure sections 426.10, 426.30; see AL Holding Co. v. O'Brien & Hicks, Inc. (1999) 75 Cal.App.4th 1310, 1313-1314.*) Permissive cross-complaints are not as restrictive since a defendant may cross-complain against a third party where the cause of action (1) arises out of the same transaction, occurrence, or series of transactions/occurrences brought against the party or (2) asserts a claim, right, or interest

in the property or controversy subject to the cause brought against the party. (*Code of Civil Procedure section 428.10(b).*) The declaratory relief, equitable indemnity, and equitable contribution causes of action are claims asserted by St. Paul in direct response to Centex's allegations of the right to defense and indemnity. These are claims in the controversy subject to the action brought against St. Paul so as to fall within the scope of Code of Civil Procedure section 428.10(b). Furthermore, St. Paul's cross-complaint against Ironshore includes a cause of action for equitable indemnity, which may be supported by merely alleging that the harm St. Paul has suffered is attributable to Ironshore. (*American Motorcycle Association v. Superior Court (1978) 20 Cal.3d 578, 607; Paragon Real Estate Group of San Franciso, Inc. v. Hansen (2009) 178 Cal.App.4th 177, 182.*) Finally, Ironshore's concerns regarding the difficulty in pursuing the construction defect portions of the case along with the insurance coverage issues may be relieved through judicial management such as bifurcation or severance of claims. (*Code of Civil Procedure section 1048.*) Since St. Paul's cross-complaint alleges sufficient facts against Ironshore, its motion is denied.

Ironshore's Motion for Leave of Court to Serve Form Interrogatories on Plaintiff

Ruling on Request for Judicial Notice

Centex's request for judicial notice, filed on August 28, 2014, is granted pursuant to Evidence Code section 452.

Centex's request for judicial notice, filed on October 2, 2014, is granted as to Exhibits A, B, and C pursuant to Evidence Code section 452. The request is denied as to Exhibits D, E, and F as duplicative of its prior request for judicial notice.

Ruling on Motion

Ironshore's motion is denied. Contrary to Ironshore's assertions, Case Management Order (CMO) No. 1 was not entered by stipulation of the parties. The court deemed the case complex, entered CMO No. 1 after a contested motion hearing, and appointed Sarah Burke as the discovery referee pursuant to Code of Civil Procedure sections 638 and 639. Based upon this reference, the discovery matters are first properly brought and heard by the discovery referee.

Even if the court were to consider the substance of the motion, the request would be denied. The propounded discovery is voluminous and unduly burdensome. Furthermore, the interrogatories do not address the discrete issues of insurance coverage that Ironshore contends substantially complicate the current litigation. Instead, Ironshore propounds standard form construction litigation interrogatories that seek information duplicative of the discovery available under the scope of work and party identity interrogatories covered in the CMO.

This, however, does not end the inquiry. CMO No. 1 was entered close in time to the filing of St. Paul's original cross-complaint. The insurance coverage issues raised in

the cross-complaint, along with the additional insurer cross-defendants, were not before the court at the time CMO No. 1 was considered and entered. CMO No. 1 also stays all discovery except that which relates to the severed seventh cause of action involving the duty to defend between Centex and St. Paul, an issue that is more aligned with the insurance coverage allegations in St. Paul's first amended cross-complaint rather than the construction defect issues subject to the CMO No. 1 discovery stay. Since the issues raised by Ironshore, who also timely objected to CMO No. 1, developed after the entry of CMO No. 1 and the insurance coverage allegations are more aligned to the severed seventh cause of action, which is not part of the CMO No. 1 discovery stay, the parties are directed to meet and confer in good faith on the development of an additional CMO tailored to the insurance coverage issues raised in Centex's and St. Paul's respective cross-complaints.

Plaintiffs' request for sanctions is denied.

9. S-CV-0030458 Regan, Charles, et al vs. LMD Roseville, LLC

Defendant/Cross-Complainant LMD Roseville, LLC's unopposed Motion for Determination of Good Faith Settlement is granted. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling tortfeasors' proportionate shares of liability for plaintiffs' injuries and therefore is in good faith within the meaning of CCP§877.6.

10. S-CV-0032378 Rodriquez, Sierra vs. Williams, Emily J.

Defendant's motion to tax costs and plaintiff's motion to strike/tax costs are both continued to December 4, 2014 at 8:30 a.m. in Department 42 to be heard by the Honorable Charles D. Wachob.

11. S-CV-0032572 Storey, Rachel, et al vs. City of Roseville

The appearances of the parties are required for plaintiff's Motion to Compel Deposition.

12. S-CV-0032864 Kover, Beckie Jean, et al vs. Sutter Medical Center, et al

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, it shall be heard in Department 43:

<u>Defendant Peter V. Hull, M.D.'s (Dr. Hull's) Motion for Summary Judgment</u>

Dr. Hull's unopposed motion is granted. A motion for summary judgment will be granted if "all the papers submitted show that there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law." (Code of Civil Procedure §437c(c).) The trial court engages in a three-part analysis when reviewing a motion for summary judgment. The first part of the analysis is to define the scope of the

motion in light of the operative pleading. The pleadings serve as the "outer measure of materiality" for a summary judgment motion in addition to determining its scope. (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258.) Next, the moving party must meet its initial burden. A moving defendant must show that a cause of action has no merit or there exists a complete defense. (Code of Civil Procedure §437c(p)(2).) The supporting evidence, and inferences reasonably drawn from such evidence, is viewed in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 843.) Only if this burden is met will the final part of the analysis be reached, which shifts the burden to the plaintiff to establish a triable issue of material fact. (Code of Civil Procedure §437c(p)(2).)

In the third amended complaint, plaintiff Beckie Jean Kover alleges Dr. Hull breached his duty to her through misdiagnoses and changing her course of care without her consent. (Plaintiffs' Third Amended Complaint pp. 3-4.) A claim for professional negligence specifically incorporates the standard of care into the elements of negligence requiring a showing that (1) there is a duty of the professional to use the skill, prudence and diligence as other members of his/her profession commonly possess and exercise, (2) a breach of that duty, (3) a proximate causal connection between the negligent conduct and the injury, and (4) damages resulting from the professional negligence. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1077.) In this regard, Dr. Hull has met his initial burden by establishing he did not breach the applicable standard of care. Plaintiff Beckie Kover came to the emergency room on April 15, 2012 complaining of shortness of breath. (Hull's SSUMF No. 1.) She was examined by Dr. Hull, who noted plaintiff was alert with no acute distress. (Id. at Nos. 4, 5.) Plaintiff's oxygen saturation level was normal and she reported feeling better after receiving breathing treatments. (Id. at No. 6.) When Dr. Hull planned on discharging plaintiff, her vital signs, respiration, and pain levels were all within normal range. (Id. at No. 7.) Despite this, plaintiff refused to be discharged, wanted to be intubated, and requested a series of medications. (Ibid.) Plaintiff refused to leave the emergency and law enforcement was finally called several hours after plaintiff initially refused to leave. (Id. at Nos. 7, 8.) While plaintiff was being escorted out of the emergency room, she experienced increased breathing movements and was taken back to the emergency room to be assessed by defendant Dr. Wallace McKinney, who admitted her to the intensive care unit due to respiratory related issues induced by a panic attack. (Id. at No. 9.) According to expert testimony, Dr. Hull's actions were appropriate and within the applicable standard of care. (Id. at Nos. 10, 11 and supporting evidence found in the Hard declaration ¶¶16, 17.) Since Dr. Hull has met his initial burden, the burden shifts to plaintiff in order to establish a triable issue of material fact. Plaintiff, however, has submitted no opposition to the current motion to establish a triable issue. Since plaintiff has failed to meet her burden, the motion is granted.

Defendant Wallace McKinney, M.D.'s (Dr. McKinney's) Motion for Summary Judgment

Dr. McKinney's unopposed motion is granted. A motion for summary judgment will be granted if "all the papers submitted show that there is no triable issue as to any

material fact and the moving party is entitled to a judgment as a matter of law." (Code of Civil Procedure §437c(c).) The trial court engages in a three-part analysis when reviewing a motion for summary judgment. The first part of the analysis is to define the scope of the motion in light of the operative pleading. The pleadings serve as the "outer measure of materiality" for a summary judgment motion in addition to determining its scope. (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258.) Next, the moving party must meet its initial burden. A moving defendant must show that a cause of action has no merit or there exists a complete defense. (Code of Civil Procedure §437c(p)(2).) The supporting evidence, and inferences reasonably drawn from such evidence, is viewed in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 843.) Only if this burden is met will the final part of the analysis be reached, which shifts the burden to the plaintiff to establish a triable issue of material fact. (Code of Civil Procedure §437c(p)(2).)

In the third amended complaint, plaintiff Beckie Jean Kover alleges Dr. McKinney breached his duty to her by failing to independently examine her and making unfounded decision. (Plaintiffs' Third Amended Complaint pp. 6-8.) A claim for professional negligence specifically incorporates the standard of care into the elements of negligence requiring a showing that (1) there is a duty of the professional to use the skill, prudence and diligence as other members of his/her profession commonly possess and exercise, (2) a breach of that duty, (3) a proximate causal connection between the negligent conduct and the injury, and (4) damages resulting from the professional negligence. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1077.) In this regard, Dr. McKinney has met his initial burden by establishing he did not breach the applicable standard of care. Plaintiff Beckie Kover came to the emergency room on April 15, 2012 complaining of shortness of breath. (Hull's SSUMF No. 1.) She was examined by Dr. Hull, who noted plaintiff was alert with no acute distress. (Id. at Nos. 4, 5.) Plaintiff's oxygen saturation level was normal and she reported feeling better after receiving breathing treatments. (Id. at No. 6.) When Dr. Hull planned on discharging plaintiff, her vital signs, respiration, and pain levels were all within normal range. (Id. at No. 7.) Despite this, plaintiff refused to be discharged, wanted to be intubated, and requested a series of medications. (Ibid.) Plaintiff refused to leave the emergency and law enforcement was finally called several hours after plaintiff initially refused to leave. (Id. at Nos. 7, 8.) While plaintiff was being escorted out of the emergency room, she experienced increased breathing movements and was taken back to the emergency room to be assessed by Dr. McKinney, who admitted her to the intensive care unit due to respiratory related issues induced by a panic attack. (Id. at No. 9.) According to expert testimony, Dr. McKinney's actions were appropriate and within the applicable standard of care. (Id. at Nos. 10, 11 and supporting evidence found in the Hard declaration ¶¶16, 17.) Since Dr. McKinney has met his initial burden, the burden shifts to plaintiff in order to establish a triable issue of material fact. Plaintiff, however, has submitted no opposition to the current motion to establish a triable issue. Since plaintiff has failed to meet her burden, the motion is granted.

Defendants Sutter Roseville Medical Center and Debra Flowers' Motion for Summary Judgment

Ruling on Request for Judicial Notice

Defendants' request for judicial notice is granted pursuant to Evidence Code §452.

Ruling on Motion

Defendants' unopposed motion is granted. A motion for summary judgment will be granted if "all the papers submitted show that there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law." (Code of Civil Procedure §437c(c).) The trial court engages in a three-part analysis when reviewing a motion for summary judgment. The first part of the analysis is to define the scope of the motion in light of the operative pleading. The pleadings serve as the "outer measure of materiality" for a summary judgment motion in addition to determining its scope. (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258.) Next, the moving party must meet its initial burden. A moving defendant must show that a cause of action has no merit or there exists a complete defense. (Code of Civil Procedure §437c(p)(2).) The supporting evidence, and inferences reasonably drawn from such evidence, is viewed in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 843.) Only if this burden is met will the final part of the analysis be reached, which shifts the burden to the plaintiff to establish a triable issue of material fact. (Code of Civil Procedure §437c(p)(2).)

In the third amended complaint, plaintiff Beckie Jean Kover alleges Sutter Roseville did not set up proper diagnosing or treatment for her. (Plaintiffs' Third Amended Complaint pp. 2-3.) She also alleges Ms. Flowers mistreated and misdiagnosed her. (Id. at pp. 4-5.) A claim for professional negligence specifically incorporates the standard of care into the elements of negligence requiring a showing that (1) there is a duty of the professional to use the skill, prudence and diligence as other members of his/her profession commonly possess and exercise, (2) a breach of that duty, (3) a proximate causal connection between the negligent conduct and the injury, and (4) damages resulting from the professional negligence. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1077.) In this regard, defendants have met their initial burden by establishing they did not breach the applicable standard of care. Plaintiff Beckie Kover stayed at Sutter Roseville Medical Center from April 15, 2012 through April 19, 2012. (Defendants' SSUMF No. 1, 13.) She was admitted on April 15, 2012 due to complaints of shortness of breath. (Id. at No. 2, 14.) Plaintiff was originally discharged on April 16, 2012 and it was medically appropriate that she not be intubated at that time. (Id. at Nos. 3-5, 15-16.) She was readmitted after her discharge and remained until her transfer on April 19, 2012. (Id. at Nos. 6-7, 18-19.) Documentation of her care during this period of time supports that her care was appropriate and within the standard of care. (Id. at Nos. 9-12, 21-24.)

In addition, expert testimony supports that defendants' care was appropriate and within the applicable standard of care. (Id. at Nos. 5, 10-12, 17, 22-24 and supporting evidence found in the MacQuarrie declaration ¶¶10, 12, 14.) Since defendants have met their initial burden, the burden shifts to plaintiff in order to establish a triable issue of material fact. Plaintiff, however, has submitted no opposition to the current motion to establish a triable issue. Since plaintiff has failed to meet her burden, the motion is granted.

13. S-CV-0032934 Amsbaugh, Brian, et al vs. Kaiser Permanente, et al

The motion to compel is continued to December 18, 2014 at 8:30 a.m. in Department 40 to be heard in conjunction with the other two pending discovery motions.

14. S-CV-0033368 Brar, Hukum, et al vs. Boparai, Gurdev Singh, et al

Defendant's Motion to Set Aside Default

Ruling on Request for Judicial Notice

Defendant's request is granted.

Ruling on Motion

The motion is denied as defendant has failed to attach a copy of its proposed answer or general denial as required under CCP§473(b).

15. S-CV-0033566 Thornton, Robert, et al vs. East West Partners, Inc., et al

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is request, it shall be heard in Department 42:

Plaintiffs' Motion to Certify Class Action

Ruling on Objections

Plaintiffs' objections to the Krieg declaration are overruled.

Ruling on Motion

The motion is denied. Class certification is appropriate upon a showing by the party seeking class treatment of "the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Code of Civil Procedure section 382; Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1021*.) Class certification limits the determination to whether a plaintiff's theory of

recovery is amenable to a unitary, classwide adjudication. (*Ghazaryan v. Diva Limosines, Ltd. (2008) 169 Cal.App.4th 1524, 1531*.) The court must grant class certification if it determines (1) the class is sufficiently numerous and can be identified from a defendant's records, (2) the class shares predominant questions of fact/law with the named plaintiff, (3) the plaintiff and his/her counsel would adequately represent the class, and (4) class treatment is superior to litigating numerous separate, identical claims. (*Id. at p. 1524*.) The motion is viewed keeping these principles in mind.

In this instance, plaintiffs have failed to present sufficient evidence to support class certification. First, there is insufficient evidence to establish the numerosity and ascertainability of the class. A class is ascertainable if it identifies a group of unnamed plaintiffs with a common set of characteristics sufficient to identify that group as having a right to recover. (*Lee v. Dynamex, Inc. (2008) 166 Cal.App.4th 1325, 1335*.) The trial court looks to the class definition, the size of the class, and the means of identifying class members in determining whether the class is ascertainable. (*Bufil v. Dollar Fin. Grp., Inc. (2008) 162 Cal.App.4th 1193, 1206-1207*.) Plaintiffs seek certification of a class of all recorded fee homeowners within the Aspen Grove Condominium Association. They also seek possible certification of two subclasses: (1) all recorded fee homeowners who were in attendance of board of director meetings where defendants eavesdropped and (2) all recorded fee co-homeowners who were in attendance of board of director meetings where defendants eavesdropped. A single declaration, the declaration of Robert Thornton, is provided to support the ascertainability and numerosity of the class. This declaration, however, is insufficient. Mr. Thornton attests there are 180 condominium units with "corresponding owners" but provides no further evidence to support this assertion. (Thornton declaration ¶5.) While Mr. Thornton's declaration describes the method homeowners could use to participate in board meetings, there is no discussion or supporting evidence to sufficiently establish the number of potential class members for the proposed class or subclasses. Nor is there sufficient evidence to sufficiently establish how these class members may be identified. Mr. Thornton did submit a supplemental declaration on September 12, 2014 that mentions approximately 120 members normally attend the annual board meeting. (September 12, 2014 Thornton declaration ¶13.) There is, however, no further evidence to support this assertion.

Second, plaintiffs have not sufficiently established a community of interest. The "community of interest" element encompasses three factors: (1) the predominance of common questions of law or fact, (2) class representatives with claims or defenses typical of the class, and (3) class representatives who can adequately represent the class. (*Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1021*.) A court examines the allegations of the complaint and supporting declarations to determine whether the legal and factual issues present allow for resolution in a single class proceeding and a class will be certified even if individual members must prove their damages. (*Id. at pp. 1021-1022*.) Plaintiffs assert that the common legal and factual questions involve defendants eavesdropping during homeowner association board meetings where they gained an unfair advantage regarding the pending litigation in Aspen Grove Condominium Association's litigation in Aspen Grove Condominium Association v. CLN Income Northstar, LLC, Placer Court case no. SCV-23959. The

supporting evidence does not sufficiently establish common legal and factual questions to warrant certification. What the Thornton declarations and first amended complaint tend to show are allegations of unfair litigation advantage that adversely affected the Aspen Grove Condominium Association's position in the litigation in Placer Court case no. SCV-23959. It does not sufficiently establish common questions of law or fact between the proposed class members or proposed subclass members.

Nor is there sufficient evidence to support plaintiffs have claims typical of the class or can adequately represent the class. It is noted that only Mr. Thornton presented supporting declarations. There are no declarations from Carole Thornton submitted to establish her claims or ability to represent the class. As for Mr. Thornton's declarations, again, the underlying issues stem from allegations of defendants receiving an unfair litigation advantage against the Association, not the individual class members, in Placer Court case no. SCV-23959. Mr. Thornton goes on to state that some homeowners could not afford assessments and approximately 25% were in hardship positions. (July 1, 2014 Thornton declaration ¶11.) He also states there was discourse among the homeowners regarding continuation of the litigation in Placer Court case no. SCV-23959. (Ibid.) These statements contradict plaintiffs' assertions that their claims are typical of the class or that they are able to sufficiently represent the class members and subclass members.

Third, there is insufficient evidence to show plaintiffs' counsel would adequately represent the class. Upon review of the supporting declarations, they are insufficient to show counsel has adequate class action experience. Counsel demonstrates that he worked with a team of other attorneys on a single class action case back in 2002. Counsel, however, provides no description of the extent of his involvement in this case. He also mentions filing a single class action case, in association with another firm, in 2009 that ultimately was not certified. Plaintiffs' counsel does not represent that any of his recent cases involve class action litigation. Nor has he demonstrated settlement of any class action cases, taking any class action cases to trial, the publication of any legal articles on class action litigation, or specialized training in the area.

Finally, there is also an overall lack of sufficiency to establish the substantial benefits from certification. There is insufficient evidence to establish the number or type of individual claims. There is also insufficient evidence to establish whether the claims would be relatively small and better addressed in a class action. Nor is there sufficient evidence to establish the possibility of numerous lawsuits that could possibly lead to inconsistent outcomes. To the contrary, the supporting evidence tends to show that a claim brought on the part of the Aspen Grove Condominium Association would better serve the parties rather than certification of a class. For all of these reasons, the motion is denied.

16. S-CV-0033568 Brown, Nicholas, et al vs. Brookview Ventures, LLC

The motion to serve by publication is dropped from the calendar at the request of the moving party.

17. S-CV-0033745 Lane, Teresa, et al vs. Wal-Mart Stores, Inc., et al

The motion for summary judgment is continued, on the court's own motion, to December 9, 2014 at 8:30 a.m. in Department 40. The court apologizes to the parties for any inconvenience.

18. S-CV-0033748 Arnold, Clayeo C. vs. Carter, Wolden & Curtis, et al

This tentative ruling is issued by the Honorable Charles D. Wachob and oral argument shall be held at 8:30 a.m. in Department 42:

The appearances of the parties are required for Defendant Daniel Nixon's Demurrer to the First Amended Complaint.

19. S-CV-0034296 U.S. Bank, N.A. vs. NNN Parkway Corporate Plaza, LLC

The demurrer to the cross-complaint is dropped from the calendar. A first amended cross-complaint was filed on August 15, 2014.

20. S-CV-0034348 Swearingen, Olga, et al vs. Bank of America, NA, et al

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is request, it shall be heard in Department 43:

Plaintiffs' OSC re Preliminary Injunction

Ruling on Request for Judicial Notice

Defendants' request for judicial notice is granted pursuant to Evidence Code §452.

Ruling on Preliminary Injunction

The request is denied. A preliminary injunction may be granted when it appears from the complaint that the plaintiff is entitled to the demanded relief and the plaintiff would suffer irreparable injury if the enjoined action were allowed to proceed. (CCP§526(a).) A foreclosure sale may be enjoined under the same elements applicable for other requests for injunctive relief, namely after a (1) balancing of the hardships of the parties and (2) a showing by the plaintiff of a reasonable probability of prevailing on the merits. (*Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust* (1985) 168 Cal.App.3d 818, 824; *Robbins v. Superior Court* (1985) 38 Cal.3d 199.) The burden is on the plaintiff to show harm if the preliminary injunction were not granted. (*Casmalia Resources, Ltd. v. County of Santa Barbara* (1987) 195 Cal.App.3d 827, 838.)

As to the initial analysis of hardship, plaintiffs claim they will suffer continuous, irreparable injury "that cannot be adequately calculated or compensated in money

damages because of the unique nature of the Subject Property". (Swearingen declaration ¶21.) The harm to defendants is the loss of opportunity to proceed with the foreclosure sale and continued loss of income. While the loss of real property would often tip in favor of plaintiffs, the hardships in this case must be placed in perspective. Plaintiffs originally defaulted on their mortgage on February 14, 2012. (Wenk declaration ¶27.) This was more than two years ago. While plaintiffs claim that the dispute and inability to pay stems from an additional $300 in tax assessments, they have failed to make any payments and are now over $74,203.98 in arrears. (Swearingen declaration ¶8; Wenk declaration ¶27.) These facts show that plaintiffs have remained in the property for over two years without any payments to defendants and they seek to enjoin the sale based upon conclusory statements of harm. The loss of a home is not taken lightly. The typical homeowner, however, is not afforded over two years to remain in a home without paying the financial obligations owed on the property. Plaintiffs' request will keep defendants in a state of limbo with no proposed end and no monetary compensation as plaintiffs are unable to afford a substantial bond or undertaking. Based upon the foregoing, the hardships upon the parties tip in favor of defendants rather than plaintiffs.

The second part of the analysis goes to the reasonable probability that plaintiffs will prevail on the merits of their action. The FAC is not verified and the moving papers focus upon (1) negligent and intentional misrepresentation; (2) breach of contract; (3) violations of Civil Code §2923.6(c) and (d); and UCL violations. The primary declaration in support of their request is submitted by Olga Swearingen, which includes two documentary exhibits. The first is a copy of the notice of trustee's sale recorded on September 17, 2014. The second is the notice of default recorded on June 13, 2014. This evidence, however, is insufficient to meet plaintiffs' burden. As it pertains to the negligent and intentional misrepresentation causes of action, plaintiffs are unable to establish defendants misrepresented the amount of the mortgage. Plaintiffs present argument that defendants failed to notify them of the full and accurate tax assessment amount. (Plaintiffs' Memorandum p. 5:8-14.) The Swearingen declaration, however, does not sufficiently address this issue. It merely refers to a $300 per month shortfall that needed to be rectified in three to four months and that monthly payments went from $1,863.85 to $2,200 per month. (Swearingen declaration ¶¶7-9.) This is insufficient to establish a misrepresentation on the part of defendants.

Nor is this evidence sufficient to establish a breach of contract. The elements of a breach of contract action are (1) the existence of a contract between the parties; (2) the plaintiff's performance or excuse for nonperformance; (3) the defendant's failure to perform (breach); and (4) resulting damages. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) Plaintiffs claim that defendants breached the agreement by failing to include the total tax assessment in their monthly payment calculation as plaintiffs were told the entire monthly payment would total $1,863.85. (Plaintiffs' Memorandum p. 6:3-11.) Again, the Swearingen declaration makes a general referral to a $300 shortfall and an increase in the in their monthly payments with no specific details or documentary evidence to support these general assertions. (Swearingen declaration ¶¶7-9.)

Plaintiffs have also failed to sufficiently establish violations of Civil Code §2923.6(c) or (d). Specifically, they admit to submitting multiple applications and those applications were denied. (Swearingen declaration ¶10.) This admission requires the court to review the evidence keeping in mind subsection (g), which limits the duty imposed upon a mortgage servicer where a borrower has submitted multiple applications. Once again, the Swearingen declaration discusses the loan modifications in general terms. The declaration does not discuss specific dates, number of application submissions, or specific reasons why each application was denied. (Swearingen declaration ¶¶10-15.) The conclusory statements in the Swearingen declaration are insufficient to establish violations under Civil Code §2923.6. Moreover, plaintiffs' allegations are sufficiently contradicted by the evidence submitted by the defendants. (see generally Wenk declaration.)

Plaintiffs are also unable to establish they will prevail on their UCL claim since this cause of action relies upon the previously discussed deficient claims. Since plaintiffs fail to present sufficient evidence to support their claims, they have not carried their burden and fail to establish an ability to prevail on the merits of their action.

The application for preliminary injunction is denied and the temporary restraining order issued on October 15, 2014 is dissolved forthwith.

21. S-CV-0034616 Federal National Mortgage Ass'n vs. Livingston, Paula S.

Plaintiff's unopposed Motion for Entry of Judgment is granted.

22. S-CV-0034841 Ornelas, Anthony vs. Hyundai of Roseville, LLC

The motion to compel is dropped from the calendar at the request of the moving party.

23. S-CV-0034860 Hudson, Bernadette vs. Hernandez, Ignacio, et al

The motion to consolidate is continued to December 18, 2014 at 8:30 a.m. in Department 40. The moving party shall comply with the notice and service requirements in CRC Rule 3.350 to ensure all parties are properly noticed and served in both cases subject to the consolidation.

24. S-CV-0035144 County of Placer, et al vs. Placer County Civil Service Comm

The motion to stay is continue to December 4, 2014 at 8:30 a.m. in Department 43 to be heard by the Honorable Michael W. Jones.

25. S-CV-0035224 Witten, Scott, et al vs. Hull, Peter, M.D.

Defendant's demurrer is sustained with leave to amend. A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of

action. (CCP§430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

Defendant correctly identifies confusion and ambiguity in plaintiffs' pleading of the first cause of action. Initially, the first cause of action, identified as one for medical malpractice, appears to include subparts that plaintiff refers to as "counts". The normal pleading practice in civil litigation, however, usually refers to "causes of action" and "counts" interchangeably. (see generally Rylaarsdam, et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶¶6:105-.6:113.) Upon closer review of the purported "first cause of action" it appears that each "count" is, in actuality, an attempt to plead separate causes of action. This inartful pleading creates sufficient uncertainty to make the negligent nondisclosure and negligent misrepresentation claims subject to demurrer. In addition, there are insufficient facts pled in the complaint to support either claim as a cause of action.

As to the second cause of action for battery, the complaint is insufficiently pled to support the claim. In the context of medical treatment, a battery occurs where a doctor performs a treatment different from the one to which consent was given. (*Rainer v. Community Memorial Hospital* (1971) 18 Cal.App.3d 240, 255.) The issue of consent is central in pleading an action for battery. The complaint, however, does not allege sufficient facts to support a lack of consent as the allegations are made up of conclusory statements.

The final challenge is to the third cause of action for breach of contract. A complaint must allege whether the contract is written, oral, or an implied contract. (CCP§430.10(g); *Otworth v. S. Pac. Transp. Co*. (1985) 166 Cal.App.3d 452, 458-459.) If the breach is based upon a written contract, then the terms must be stated verbatim in the complaint or by attaching a copy of the written instrument to the complaint. (*Id*. at p. 459.) Plaintiffs do not sufficiently allege the type of contract between the parties or sufficiently state the terms of the contract. Thus, the third cause of action also fails.

Any amended complaint shall be filed and served on or before December 1, 2014. Plaintiff is also afforded leave to properly refer to each claim as a separate cause of action and adjust the numbering of each cause of action accordingly.

26. S-CV-0035262 Piatti Restaurant Company, L.P. vs. Andoria, LLC

The motion for entry of stipulated judgment is continued to December 18, 2014 at 8:30 a.m. in Department 40. The proof of service states that defendant was served at an improper address. Plaintiff served defendant's counsel at 1624 Santa Clara Drive, Suite 210, Roseville, California 95661. The address of record on file for defendant's counsel is 1624 Santa Clara Drive, Suite 220, Roseville, California 95661.

27. S-CV-0035342 Symetra Assigned Benefits Serv. Co., et al - In Re the Petit

The petition for transfer structured settlement is granted.

28. S-CV-0035358 Ieremciuc, Camelia, et al - In Re the Petition of

The appearance of the party is required for the hearing on the minor's compromise petition. Petitioner may appear by phone. The appearance of the minor at the hearing is waived.

These are the tentative rulings for civil law and motion matters set for Thursday, November 20, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, November 19, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.